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INDEPENDENT

The Honorable Spencer Abraham
Secretary
U. S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Dear Secretary Abraham:

I am writing to urge you to recommend federal intervention in an action against a government contractor, Lockheed Martin, for alleged illegal activities at the Paducah Gaseous Diffusion Plant. Activities by Lockheed Martin and other contractors at Paducah have resulted in a public health and environmental catastrophe that has triggered seven front-page articles in the *Washington Post*, three congressional hearings, extensive federal investigations that have confirmed the contractors' wrongdoing, and a personal visit and apology to the workers by your predecessor, former Secretary Bill Richardson.¹

Yet despite the extensive evidence of serious misconduct by Lockheed Martin, the Department of Energy has repeatedly delayed a key decision on this matter. DOE must recommend whether or not the Department of Justice should intervene in whistle-blower litigation against Lockheed Martin. The suit seeks to recover damages for the U.S. government under the False Claims Act. The latest extension of the deadline for DOJ participation ends September 1, and I understand that DOE is in the process of developing a recommendation to DOJ on this matter.² There appear to be compelling reasons to protect the interests of the workers (who are suffering terrible health damage from radiation exposure), as well as the interests of the federal taxpayers (who are likely to pay billions to clean up the Paducah site), by intervening on the side of the plaintiffs in the whistle-blower litigation.

¹See discussion *infra* at 2-3 and notes 4, 5, and 12; *Uranium Workers Get Apology*, Courier-Journal (Sept. 17, 1999).

²Letter from Lee Liberman Otis, General Counsel, U.S. Dept. of Energy, to Glenn V. Whitaker and Charles Cooper (Aug. 1, 2002).

Background

The Paducah Gaseous Diffusion Plant, near Paducah, Kentucky, was built in the early 1950's to enrich uranium for military applications. Since the mid-1960s, the plant has produced enriched uranium for use in commercial nuclear power reactors. The plant was operated by Union Carbide (initially by a precursor company) until 1984, then by a subsidiary of Martin Marietta, which merged with Lockheed in 1995, and by Bechtel Jacobs since 1998. According to the plaintiffs, the government paid Lockheed Martin tens of millions of dollars of costs, fees, awards, and/or incentives for work at the Paducah plant and site.³

In June 1999, three workers from the plant filed a lawsuit against Lockheed Martin under the False Claims Act. The workers' charges were subsequently revealed in a series of front page articles in the *Washington Post*.⁴ They allege that company officials allowed thousands of Paducah workers to be exposed unwittingly to plutonium and other highly radioactive metals. The workers also revealed that plant operators had dumped radioactive and chemical wastes outside the plant boundaries, producing extensive environmental contamination. In addition, they charge that the plant's metal recycling program, which recaptured valuable metals from nuclear warheads, failed to screen the metals for radioactivity before releasing them for public or private reuse.

After being notified of the allegations, DOE conducted several studies, which appeared to support the workers' charges.⁵ DOE found serious past and ongoing deficiencies in radiological

³Joint Complaint and Demand for Jury Trial, *U.S. v. Lockheed Martin Corp. et al.*, No. 5:99CV00170R (W.D. Ky. filed June 1, 1999).

⁴*In Harms's Way, and in the Dark; Workers Exposed to Plutonium at U.S. Plant*, Washington Post (Aug. 8, 1999); *Richardson Orders Probe of Uranium Plant in Ky.*, Washington Post (Aug. 9, 1999); *A Deathly Postscript Comes Back to Life; After Being Rejected, Warnings of Paducah Atomic Worker Now Hailed as Heroism*, Washington Post (Aug. 11, 1999); *Radioactive Gold: Did It Go to Market?; Metal Recycled From Warheads Wasn't Screened, Nuclear Workers Charge*, Washington Post (Aug. 14, 1999); *Paducah's Silent Witness; Excessive Uranium Level Found in Worker's Bones*, Washington Post (Aug. 22, 1999); *Radioactive Ooze Found in Paducah; Seepage Outside Plant May Denote Illegal Waste*, Washington Post (Aug. 29, 1999); *Radiation Risks Long Concealed; Paducah Plant Memos Show Fear of Public Outcry*, Washington Post (Sept. 21, 1999); *Plant Hid Risk from Workers; Paducah Bosses Knew Some Had High Radiation Levels*, Washington Post (Dec. 23, 1999).

⁵See U.S. Dept. of Energy, Office of Oversight, Environment, Safety and Health, *Phase I Independent Investigation of the Paducah Gaseous Diffusion Plant, Environment, Safety, and Health Issues* (Oct. 1999) (hereinafter "Phase I Report"); U.S. Dept. of Energy, Office of

protection, worker safety and health, and public and environmental protection.⁶ For example, DOE found that workers were not told that plutonium and other transuranic elements were present at the plant, or that these extremely hazardous, highly radioactive substances require greater precautions against exposure.⁷ In a “preliminary” assessment, DOE found that 2,500 to 4,000 workers had the potential for increased radiation exposures, and of these, perhaps 10% could have had internal radiation exposures above regulatory limits.⁸ DOE also found that “[u]nsegregated radiological and chemical materials and waste were dumped or buried both inside and outside the fence on DOE property and were not controlled or documented.”⁹ As late as October 1999, DOE found that there were insufficient warnings and barriers at contaminated areas off-site, some of which are located in a state wildlife area used by the public for recreation.¹⁰ DOE also found that groundwater contamination plumes extended over two miles offsite, were growing at roughly a foot per day, and were inadequately characterized by the plant operator.¹¹ These are just a few of the numerous failures cataloged in the DOE reports.¹²

Oversight, Environment, Safety and Health, *Phase II Independent Investigation of the Paducah Gaseous Diffusion Plant, Environment, Safety, and Health Practices 1952-1990* (Feb. 2000) (hereinafter “Phase II Report”); U.S. Dept. of Energy (submitted by University of Utah, Center for Advanced Medical Technologies, Center of Excellence in Nuclear Technology, Engineering and Research; and Paper, Allied Industrial, Chemical and Energy Workers (PACE) International Union), *Exposure Assessment Project at the Paducah Gaseous Diffusion Plant* (Dec. 2000) (hereinafter “Exposure Assessment”); U.S. Dept. of Energy, Oak Ridge Operations, *Report on the Paducah Gaseous Diffusion Plant Metals Recovery Program* (Dec. 2000) (DOE/ORO-2105).

⁶See Phase I Report; Phase II Report.

⁷Phase II Report, 69.

⁸Exposure Assessment, xi.

⁹Phase II Report, 69.

¹⁰Phase I Report, 2; *Safety Measures Ordered at Kentucky Uranium Plant; Investigation Uncovers Dozens of Oversights in Radiation Safeguards*, Washington Post (Sept. 15, 1999).

¹¹Phase I Report, 2.

¹²These issues were also explored in three congressional hearings. See House Committee on Commerce, Subcommittee on Oversight and Investigations, *Hearing on the Paducah Gaseous Diffusion Plant: An Assessment of Worker Safety and Environmental Contamination*, 106th Cong. (Sept. 22, 1999) (H. Rept. 106-87); Senate Committee on Energy and Natural Resources, Subcommittee on Energy Research, Development, Production and Regulation, *Hearing To Review the Department of Energy’s Findings at the Gaseous Diffusion Plant in Paducah*,

Health and Environmental Costs

The costs of these practices at Paducah are massive. No one knows how many workers have lost their health and even their lives due to radiation exposure at Paducah or how many more will do so in the future. However, DOE's exposure assessment and anecdotal evidence of the rates of rare cancers and other fatal diseases among the workers suggest that these numbers may be substantial. In 2000, Congress passed legislation establishing a compensation program for workers who have contracted cancer from occupational radiation exposure at DOE nuclear facilities.¹³ To date, 342 workers at Paducah have received payments of \$150,000 each under this program, for a total current cost of \$51.3 million.¹⁴ About 1,800 past and present workers have participated in a health screening program.¹⁵

The environmental damage is also severe and will be incredibly costly to remediate. In testimony before Congress in 2000, GAO stated that "the scope of the planned cleanup activities for the six categories is immense."¹⁶ For example, DOE must address three plumes of groundwater flowing toward the Ohio River, which contain an estimated 10 billion gallons of groundwater tainted with trichloroethene and 250 million gallons tainted with radioactive technetium-99.¹⁷ Surrounding creeks and ditches have surface water contamination.¹⁸ On and

Kentucky and To Receive Testimony Regarding the Department of Energy's Plans for Cleanup at the Site (March 31, 2000); Senate Committee on Energy and Natural Resources, Subcommittee on Energy Research, Development, Production and Regulation, *Hearing To Receive Testimony on the April 2000 GAO Report Entitled "Nuclear Waste Cleanup – DOE's Cleanup Plan for the Paducah, Kentucky Site Faces Uncertainties and Excludes Costly Activities,"* (June 27, 2000).

¹³Energy Employees Occupational Illness Compensation Program Act of 2000, 42 U.S.C. §§ 7384-7385.

¹⁴Telephone communication from Dept. of Labor staff (August 2, 2002).

¹⁵*Bunning: DOE Wanted to Kill Screening Fund*, Paducah Sun (July 26, 2002).

¹⁶Testimony of Ms. Gary L. Jones, Associate Director, U.S. General Accounting Office, Senate Committee on Energy and Natural Resources, Subcommittee on Energy Research, Development, Production and Regulation, *Hearing To Receive Testimony on the April 2000 GAO Report Entitled "Nuclear Waste Cleanup – DOE's Cleanup Plan for the Paducah, Kentucky Site Faces Uncertainties and Excludes Costly Activities"* 5 (June 27, 2000) (GAO/T-RCED-00-225) (hereinafter "GAO Testimony").

¹⁷*Id.*

¹⁸*Id.*

off-site soils are contaminated.¹⁹ There are 12 waste burial grounds that must be addressed, as well as the equivalent of 52,000 barrels of waste stored on-site.²⁰ While DOE estimated that its cleanup would cost \$1.3 billion and take 10 years, GAO questioned numerous assumptions underlying that estimate.²¹ GAO also noted that additionally, “billions of dollars and many years more will be needed to address areas at the site not currently included in the cleanup plan” because they fall under the jurisdiction of a different DOE office.²² The additional areas include almost a million cubic feet of waste and scrap, and 16 unused buildings and structures, including a sludge lagoon.²³ According to GAO, DOE had not identified the exact nature and extent of contamination in those areas, but had identified 73 areas as posing the risk of an uncontrolled nuclear reaction.²⁴ In addition, DOE plans to build and operate a facility to convert nearly half a million tons of depleted uranium hexafluoride stored at the site to a more stable form, which it estimates will cost \$1.8 billion to \$2.4 billion.²⁵ A further \$1 billion would be required to decommission the current plant after it ceases operations.²⁶ Thus, while the total cleanup cost is unknown, it appears that it will be many billions of dollars.

The Litigation

On June 1, 1999, three workers and an environmental organization filed suit against Lockheed Martin (including its predecessor corporate entities) under the False Claims Act.²⁷ The litigants (termed “relators” in this type of case) charge that Lockheed Martin knowingly made false statements and claims to DOE for purposes of: (1) inducing DOE to pay tens of millions of

¹⁹*Id.* at 6.

²⁰*Id.*

²¹See U.S. General Accounting Office, *Nuclear Waste Cleanup: DOE's Paducah Plan Faces Uncertainties and Excludes Costly Cleanup Activities* (April 2000) (GAO/RCED-00-96) (hereinafter “GAO Report”).

²²*Id.* at 5.

²³GAO Testimony, 10-11.

²⁴*Id.* at 11.

²⁵GAO Report, 6.

²⁶*Id.*

²⁷*U.S. v. Lockheed Martin Corp. et. al*, No. 5:99CV00170R (W.D. Ky. filed June 1, 1999).

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dollars to the company under its contracts to operate the Paducah plant; and (2) concealing or avoiding its obligations to provide DOE remediation services or funding to compensate for the company's prior misconduct.²⁸ The litigation seeks to recover, at a minimum, over \$1 billion in damages and civil penalties for the U.S. government. The whistle-blowers who brought the case would receive 15 to 30% of the total recovery, pursuant to the False Claims Act.

The False Claims Act provides that the government has the right to intervene in a whistle-blower suit. The June 1, 1999, notification triggered a 60-day deadline for DOJ to decide whether to intervene in the Paducah case. Over the past three years, the relators have agreed to twelve extensions of this deadline to allow DOE and DOJ to investigate the charges fully. The FBI has also been involved in the investigation.²⁹ The deadline for the decision is now September 1, 2002, and the relators have stated that they will not agree to any further extensions.³⁰

Intervention is Appropriate

While DOJ makes the final decision regarding intervention in a False Claims Act case, DOJ gives substantial weight to the recommendation of the affected federal agency that has suffered the alleged fraud.³¹ Although DOJ may intervene contrary to the affected agency's recommendation, this occurs rarely, and such a decision must be made by more senior officials within DOJ.³²

Government intervention in a False Claims Act case is appropriate where: (1) the government has a meritorious case that it has been defrauded by a contractor; and (2) the expenditure of the necessary government resources is justified in light of factors such as the potential size of the recovery, the magnitude of the malfeasance, the precedential value of the

²⁸Joint Complaint and Demand for Jury Trial, *U.S. v. Lockheed Martin Corp. et al*, No. 5:99CV00170R (W.D. Ky. filed June 1, 1999).

²⁹*FBI Tightens Security at DOE Site, Paducah Sun* (Feb. 12, 2000); *Officials Seize Contractor Records in Paducah, Ky., Energy-Plant Case*, Knight-Ridder Tribune Business News (Feb. 18, 2000).

³⁰Letter from Charles J. Cooper to Lee S. Liberman Otis, General Counsel, U.S. Dept. of Energy (May 16, 2002).

³¹Telephone communication from Michael Hertz, Director, Commercial Litigation Branch, U.S. Dept. of Justice (Aug. 5, 2002).

³²*Id.*

case, and the lack of other adequate remedies.³³ Where the case is meritorious and sufficiently significant, the defrauded agency should not oppose intervention absent a legitimate government policy reason.

The decision as to whether the federal government should intervene in a whistle-blower case is independent of the decision governing the substantive outcome of the case. As a general matter, I am careful not to call for a particular substantive outcome in a judicial proceeding to which I am not a party. In this case, however, the decision by an agency to recommend intervention or to intervene does not dictate the substantive result of the case. The case will go forward regardless of whether the government intervenes, and it will ultimately be decided by a judge or jury.

In this case, there appears to be a basis for claims that Lockheed Martin mishandled radioactive materials and waste, inadequately protected workers against exposures, and made false reports to the government. According to the relators' attorneys, the DOJ attorneys conducting the pre-litigation investigation believe that this is a strong case, as does EPA.³⁴ The government has apparently paid Lockheed Martin tens of millions of dollars in fees, has spent hundreds of millions of dollars to date on cleanup and compensation activities, and almost certainly will have to spend billions more in the future. If this litigation succeeds, the government would recover a significant portion of these costs. Moreover, the cost of the alleged malfeasance is not just loss of money – it is loss of workers' health and lives, and extensive environmental damage. This case appears to have legal merit, and it is certainly worth the expenditure of government resources.

While it is possible for the relators to go forward even if the government declines to intervene, such a case is much less likely to succeed.³⁵ The government has substantial litigation resources, which can be particularly important in litigation against a large and sophisticated corporate defendant such as Lockheed Martin. Also, DOJ can obtain access to evidence that is classified material and unavailable to public litigants, which may be relevant here with regard to evidence related to DOE nuclear weapons program activities. In addition, the fact that the government has had an opportunity to intervene and has declined to do so is likely to be seen by a court as indicative of the government's views of the merits of a case. Thus, if the government

³³*See id.*

³⁴Letter from Charles J. Cooper to Lee S. Liberman Otis, General Counsel, U.S. Department of Energy (May 16, 2002).

³⁵*See Taxpayers Against Fraud, Qui Tam Statistics (as reported by DOJ: FY ending Sept. 20, 2001)* (showing significantly higher success rates and recoveries for whistle-blower cases where the government is a party) (online at <http://www.taf.org/statistics2.html>).

declines to intervene, that decision may well cost taxpayers hundreds of millions of dollars that could and should have been recovered.

Lockheed Martin's Political Influence

Although the merits of intervention appear compelling, it is also true that Lockheed Martin has tremendous political influence with the federal government. For the past several election cycles, Lockheed Martin has consistently been the top defense company contributor to federal political campaigns.³⁶ Lockheed Martin contributed almost \$1.5 million to Republican candidates in the 2000 election cycle, and has contributed almost \$750,000 to Republicans thus far in the 2002 election cycle.³⁷ The company was also among the largest corporate contributors to President Bush's inauguration fund, with a \$200,000 donation.³⁸ In May of this year, Lockheed Martin contributed \$100,000 at a Republican fundraiser featuring President Bush.³⁹

Lockheed Martin is also a significant contributor to Democrats. Lockheed Martin contributed almost \$1 million to Democratic candidates in the 2000 election cycle, and has contributed over \$650,000 to Democrats thus far in the 2002 election cycle.⁴⁰

In addition, Lockheed Martin has numerous close ties with members of the Bush Administration. Vice President Cheney's wife, Lynne Cheney, served on the board of Lockheed Martin until 2001. The top two officials at the Department of Transportation, Secretary Norman Mineta and Deputy Secretary Michael Jackson, are both former Lockheed Martin executives. Assistant Secretary of State Otto Reich did lobbying work for Lockheed Martin.⁴¹

I know you agree that it would be inappropriate for political considerations to influence this decision, and it is unfortunate that Lockheed Martin's political activities could create an appearance problem if DOE recommends against intervention. But if the facts dictate that DOE

³⁶Center for Responsive Politics (online at <http://www.opensecrets.org/industries/index.asp>).

³⁷*Id.*

³⁸*Id.*

³⁹*On Day of Big Fund-Raiser, White House Is Attacked as 9/11 Marketer*, New York Times (May 15, 2002).

⁴⁰*Id.*

⁴¹*Senate Switch Threatens Cuba Measures*, Chicago Tribune (June 1, 2001).

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should not intervene, then I would urge you to make that decision, notwithstanding the perception problems that would exist.

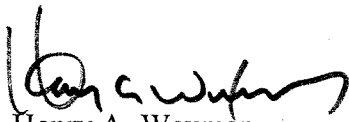
As I pointed out above, however, I believe it is appropriate for the government to intervene in this case. If a corporation has indeed caused this terrible harm at Paducah, it would be outrageous to force the public to pay the bills three times over – first for the contract fees, second in suffering the harm, and third for the cleanup to prevent further damage.

Conclusion

The alleged magnitude of the corporate malfeasance, the harm to the workers and citizens of Paducah, the environmental damage, and the ultimate costs to U.S. taxpayers all support intervention in this potentially critical litigation. I hope that you agree that the government must not abandon its responsibility here.

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry A. Waxman", with a stylized flourish at the end.

Henry A. Waxman
Ranking Minority Member